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The basic objectives and main provisions of competition laws and policies

Study by the UNCTAD secretariat

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SUMMARY AND CONCLUSIONS

1. Different competition laws aim at a variety of objectives; apart from objectives directly related to competition, these may include ensuring the freedom of economic action, fairness, controlling concentration of economic power, the public interest, and competitiveness of national firms. However, the distinctions among laws based upon these criteria are blurred, and the trend is towards relatively greater emphasis upon competition, efficiency and competitiveness objectives. There are also differences among countries in the priority attached to competition policy vis-à-vis other policy objectives, but such differences have been greatly reduced by the universal trend towards economic liberalization, market orientation and adoption of competition policies. Different approaches are applied for the control of restrictive business practices (RBPs), based upon the "rule of reason", "prohibition" or "abuse"; different techniques are also used for analysing markets. In practice, the application of these approaches or techniques often yields similar results, and enforcement methods have converged.

2. The process of convergence has manifested itself particularly in the universal condemnation of collusive practices, subject to some exemptions in some countries. Other types of cooperation or joint ventures are examined on a case-by-case basis, and different types of exemptions may be granted to them. Among vertical restraints, only resale price maintenance is usually subject to per se prohibitions under most competition laws. Enforcement policies relating to other vertical practices differ significantly, but they are normally subjected to economic evaluation, taking into account inter alia the existence or abuse of dominant positions. The core concept of dominance of a relevant market is similar in most competition laws. Different market shares or turnover thresholds may trigger off investigations or establish presumptions of dominance, but qualitative evaluations would also be undertaken. Special obligations may be imposed upon dominant firms, and they would be subject to abuse control under most laws. However, there are differences as to where the line should be drawn between legitimate business strategies and abuse of dominance or unlawful monopolization. Abusive exploitation of economic dependence is also prohibited under some laws, while other laws prohibit practices considered as abuses even where there is no dominant position. There are also significant differences among competition laws and enforcement policies relating to the treatment of mergers, joint ventures and interlocking directorates and shareholdings, including in the criteria applied relating to strengthening of dominance or behaviour substantially lessening competition. Considerations relating to efficiency, competitiveness, industrial policy or public interest play a particularly important role in this area. But there has been some convergence in this area in recent years. Many developing countries have recently adopted merger controls, but enforcement has so far often been relatively relaxed; this is likely to change with time.

3. Despite the substantial differences among competition laws and policies, there is now sufficient common ground to form the necessary substantive basis for strengthened cooperation. However, further efforts are needed to clarify the scope of such common ground and to exchange views in respect of remaining differences. As suggested by the fourteenth session of the Intergovernmental Group of Experts to the Third Review Conference, areas which might be

considered include: (a) the role of competition policy in the strengthening and improvement of the economies of developing and other countries and, in particular, the development of the business community; (b) taking into account economic globalization and liberalization, the identification of appropriate measures to help those countries that might be hampered by RBPs; (c) the interface between competition, technological innovation and efficiency; (d) the competition policy treatment of vertical restraints and abuses of dominant position; (e) the competition policy treatment of the exercise of intellectual property rights and of licences of intellectual property rights or know-how; (f) in-depth analysis of differences in the scope of competition laws in individual sectors, in the light of the process of economic globalization and liberalization; and (g) in-depth analysis of the effectiveness of enforcement of competition laws, including enforcement in cases of RBPs having effects in more than one country. Individual governments may wish to clarify the scope or application of their competition laws and policies, including in the light of individual cases, and taking into account relevant provisions of the Uruguay Round Agreements. In the context of this exercise, governments may wish to discuss: (i) how the Set of Principles and Rules might be better implemented; (ii) the competition implications at the national, regional and international levels of globalization and liberalization; (iii) techniques and procedures for detecting and sanctioning collusive tendering, including international cartels and other anti-competitive practices; and (iv) the strengthening of information exchange, consultations and cooperation in enforcement at the bilateral, regional and multilateral levels having effects overseas.

INTRODUCTION

4. This draft study has been prepared by the UNCTAD secretariat in accordance with the Agreed Conclusions adopted by the Intergovernmental Group of Experts at its fourteenth session. 1/ It is based on part of the outline of the study which was presented to that session of the Group, 2/ taking into account comments made by delegations on this outline. It constitutes a background paper to a study entitled "The scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round Agreements relevant to competition policy, including their implications for developing and other countries" (TD/RBP/CONF.4/8), also prepared in accordance with the Agreed Conclusions of the Group of Experts as part of the documentation for the Third United Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, meeting in Geneva from 13-21 November 1995.

5. This study describes some basic objectives and provisions of competition laws and policies which have not been dealt with in TD/RBP/CONF.4/8 because of space limitations. Given the potentially wide subject-matter of this study, it does not aim to provide a definitive and detailed description of such provisions, but rather to sketch a broad and selective picture. 3/ Chapter I describes the general criteria for controlling RBPs established in different competition laws, as well as different enforcement methods and techniques used in applying these laws in practice. Chapter II describes the treatment in selected competition laws of horizontal restraints; Chapter III covers vertical restraints; Chapter IV covers market dominance and abuse; and Chapter V covers mergers, joint ventures and interlocks.

Chapter I

GENERAL CRITERIA AND METHODS FOR CONTROLLING RESTRICTIVE BUSINESS PRACTICES

6. Competition laws often identify the general criteria on the basis of which practices are controlled, by indicating what the law aims to prevent or to promote, or the interests or values which it is seeking to protect. These criteria are sometimes implicitly included in the statement of objectives of a law. Thus, for example, the Venezuelan competition law has as one objective "to prohibit monopolistic and oligopolistic practices and other means that could impede, restrict, falsify or limit the enjoyment of economic freedom". 4/ The Indian competition law aims "to ensure that the operation of the economic system does not result in the concentration of economic power to the common detriment and to prohibit such monopolistic and restrictive trade practices as are prejudicial to the public interest". 5/ Sometimes, the criteria applicable are established through judicial or policy declarations; thus, the United States courts have stated that its antitrust laws are "a charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade". 6/ Alternatively (or in addition), the criteria applicable may be deduced from the list of factors that the competition authority may take into account in applying the law. Thus, the Sri Lankan Fair Trading Commission, in deciding whether a practice is against the public interest, has regard to the promotion of competition, of consumer interests and of cost reduction, the development of new techniques and products and of new market entry, and the maintenance and promotion of the balanced distribution of industrial activity and employment, and of competitive activity in export markets. 7/

7. The events that different laws seek to control or to prevent include: the lessening of competition; restrictions upon freedom of economic action or upon access to markets; adverse effects upon consumer welfare; abuses of economic power, taking unfair advantage of economic dependence and other unfairness and inequity in business; concentration of capital and/or economic power and the centralization of economic decision-making; adverse effects upon business opportunities for small- and medium-size enterprises (SMEs); adverse effects upon the public interest, general economic interest or economic and social development (which may include effects upon a range of factors such as regional development, employment, inflation, technological development, efficiency, or the balance of trade); adverse effects upon economic efficiency; 8/ and reduction of the competitiveness of national firms in national and foreign markets. The European Union's competition rules apply criteria relating to both competition and effects upon trade among member States; these criteria are to be construed in the light of the general objectives of the Union, including inter alia the establishment of a common market, the progressive approximation of the economic policies of member States, and the promotion of economic growth and of increases in the standard of living. 9/

8. However, the distinctions among competition laws based upon these criteria are usually blurred. Competition laws often expressly or implicitly indicate more than one criterion. The Canadian law, for example, aims "to maintain and encourage competition in Canada in order to promote the

efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small- and medium-size enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices" 10/ (the Canadian law aims at maximizing total social welfare rather than only consumer welfare). As the application of different criteria could lead to similar results in practice, it is difficult to tell how much relative weight is assigned to different criteria. Competition authorities may have substantial discretion in the application of the law - in the United States, for example, the attainment of greater efficiency is not a cognizable legal defence to a merger having anti-competitive effects, but efficiency and competitiveness considerations are taken into account by the federal enforcement agencies in deciding whether or not to oppose a merger. 11/ Moreover, in the enforcement practice of different countries, priority may be given in practice to criteria other than the main criterion stated in the law (particularly as the courts' and enforcement agencies' views may evolve over time), exemptions may be based upon subsidiary criteria, or a political authority may be granted the power to override decisions of the competition authority. Whatever the criteria applied and whatever the weight assigned to them in individual cases, however, there is general agreement that competition policies should promote consumer welfare and economic efficiency by preserving the freedom of economic action of market participants and hence, the competitive market system, as the principal institution for allocating resources and determining prices and output. There has in fact been an increasing convergence in the provisions or the application of competition laws over the last two decades. Competition systems in many countries are now placing relatively greater emphasis upon the protection of competition, as well as upon efficiency and competitiveness criteria, rather than upon other public interest goals. While, therefore, the use in various competition laws of different general criteria for controlling RBPs would make a significant difference in these laws' scope, coverage or enforcement, the similarities are more important in practice.

9. In a broad competition policy perspective, there are also differences among countries in the priority attached to competition policy and the relative weight it is given when it clashes with other policies. Even in countries with long experience in the application of competition policy, there may sometimes be a tendency to provide greater priority to trade or industrial policy objectives (particularly for declining or high-technology sectors). The arguments made in favour of such policies in relation to high-technology industries, in particular, have some similarities with the "infant industry" arguments long made by developing countries. The granting of greater weight to non-competition criteria is one reason behind the grant of some exemptions from the application of competition laws. But it is also reflected in a large range of other laws and policies, both of a general and of a sector-specific nature. Again, however, the universal trend towards economic liberalization and market orientation has greatly reduced the differences among economic

policies over the last 15 years or so; departures from competition are now seen everywhere as exceptions to a general rule, and such exceptions are continually being reduced. 12/

10. Divergences may also arise in the application of competition laws because of differences in the three basic approaches that are applied by different countries for the evaluation and control of RBPs, approaches that are usually deeply rooted in the legal and administrative systems of the countries concerned. Under the "rule of reason" approach adopted by the United States and some other countries (mainly with a common law background), most practices are forbidden only if they are "unreasonable", i.e. if, on the facts of an individual case, the anti-competitive effects of a practice outweigh any competitive benefits resulting therefrom. This leaves substantial discretion to the enforcement agencies as to whether or not to take enforcement action, and to the courts as to whether the practice is so "unreasonable" that it should be forbidden. Under the "prohibition" approach adopted by most civil law countries, on the other hand, the competition law forbids a number of practices in principle, but then provides for exemptions in specified circumstances; competition authorities have the authority to decide whether or not a practice in an individual case falls within the terms of these exemptions, and may also have the authority to grant block exemptions for some practices or some sectors. Article 85 of the Treaty of Rome, for instance, prohibits agreements, decisions and concerted practices affecting trade between member States and restricting or distorting competition. However, these may be exempted if they contribute to improving the production or distribution of goods or to promoting technical or economic progress and allow consumers a fair share of the resultant benefit, and do not impose restrictions which are not indispensable to achieve the benefit sought, or afford the possibility of eliminating competition in respect of a substantial part of the products in question. A number of block exemptions have been issued, and exemptions are also frequently granted in individual cases. However, no exemptions may be granted from the prohibition against abuses of dominant position, contained in Article 86 of the Treaty. Similar provisions exist in the laws of several countries, although competition authorities may not be provided with such broad powers to issue block exemptions. Under the Venezuelan law, for instance, the head of State has the power, having heard the opinion of the competition authority, to establish norms under which certain practices (price-fixing, discriminatory trading and exclusive distributorship or agency agreements) may be authorized; such an authorization must aim at contributing to production improvements, commercialization and distribution of products and promotion of technical and economic progress, and the authorized activities must entail advantages for consumers or users. However, even where such norms have been established, a prior authorization of such practices must be granted by the competition authority, which must permit the minimum restriction required to achieve the intended goals, and control its implementation. A third type of approach prevailing in some countries such as Denmark or the United Kingdom is the "abuse" approach, under which restraining agreements are accepted as valid unless the authorities consider that they adversely affect competition or other public interest goals.

11. In practice, the differences among these approaches is not as great as would appear at first sight. As noted above, there has been a trend towards convergence in the techniques of economic analysis and competition enforcement policies applied in different countries. Moreover, many countries apply a mixture of all three approaches to different types of practices, or to different effects of a practice. Competition systems using rule of reason or abuse approaches often contain per se prohibitions of certain practices, and have also built up case law or administrative practice (sometimes set out in enforcement guidelines) which clarify the application of the law, thus limiting discretion in the application of the law. On the other hand, in countries using prohibition approaches, even though competition authorities may have less discretion in general, they would still need to exercise discretion to assess whether a restrictive agreement falls within the exemptions allowed by the law; discretion would also be required where the competition law has a de minimis requirement that a restraint of trade must be undue, 13/ material or significant to fall within the law's scope. It is particularly common for such discretion to be exercised to permit non-price vertical restraints. However, these different approaches may still make a significant difference in respect of competition laws' scope, coverage or enforcement, partly because the burden of proof to show or to disprove adverse effects upon competition may vary according to the approach used. Under the prohibition approach, it is usually for parties engaging in restrictive agreements to establish they fall within an exemption. Under the abuse approach, it is usually for the competition authority to make the case for abuse. Under the rule of reason approach as applied under United States law, the burden of proof is on the competition authority or other plaintiff to demonstrate the unreasonableness of a restriction to the courts; even where a per se offence is involved, it would be necessary to demonstrate that the elements of the per se violation exist, and this may sometimes involve a truncated rule of reason analysis.

12. Differences in the application of competition laws may also arise from differences in the methodologies used for identifying the relevant product and geographic markets in which competition may have been restrained. Two basic tests are applied to identify the relevant market, i.e. the reasonable interchangeability of use and the cross-elasticity of demand. Under the first test, an assessment would be made of reasonable possibilities for consumers to switch to other producers or substitute products, and for other producers to supply the same or substitute products. Under the cross-elasticity test, an enquiry is made as to customers' willingness to switch to substitute products as a result of a hypothetical price increase. While the United States applies both tests in a complementary manner, the reasonable interchangeability of use is more commonly used in other countries. In practice, the application of the two tests would often yield similar results but, in certain cases, the determination of the relevant market and, hence, the finding as to whether there is dominance or market power in a given case, may vary appreciably. Moreover, in identifying the relevant geographic market, significant differences in enforcement may arise depending upon the extent to which account is taken of potential as well as actual competition from imports, 14/ global market shares, prices on international markets, trade data, trade barriers, exchange rates and other international uncertainties. In general, in the United States, there appears to be a greater willingness to consider factors indicating that markets are

"contestable", thus reducing the likelihood of action being taken against mergers and monopolies. 15/ The notions of "technology markets" (rather than just a market in a specific tangible product) and of "innovation markets" 16/ are also utilized in the United States. It is likely that continuing rapid change in technologies and in business strategies, as well as globalization of markets, will magnify the effects of the differences in the methodologies used to delineate markets, and hence accentuate differences in the outcomes of cases handled by different competition authorities, unless efforts are made to strenghten consultations among them.

Chapter II

HORIZONTAL RESTRAINTS

13. By and large, despite differences in form, 17/ there is a substantial similarity in the identification and treatment of horizontal RBPs under different competition laws. Such practices as horizontal price-fixing, collusive tendering and associated practices (such as the allocation of markets, customers or sales or production quotas and collective boycotts) are universally condemned, while certain types of cooperative arrangements and joint ventures are examined on a case-by-case basis or may be exempted. It is true that, while collusion is illegal per se (and may even be subject to criminal penalties) in some countries, it is not subject to an absolute prohibition in other countries. Particularly in some laws based on the prohibition or abuse principles, horizontal and vertical restraints are prohibited in the same manner, and exempted in accordance with the same criteria. Under the Indian law, for example, both horizontal and vertical restrictive trade practices are deemed to be prejudicial to the public interest unless certain conditions are met, for example if the removal of the restriction would deny substantial advantages to consumers, or the restriction is reasonably necessary to counteract measures taken by a third party or to negotiate fair terms with a dominant purchaser or supplier, or there would be serious adverse effects upon employment.

14. In practice, competition laws in virtually all countries would be applied more severely against collusion than against vertical practices. In contrast to the thorough economic analysis normally applied to vertical practices, only a summary examination would be undertaken before it is determined that a horizontal practice has adversely affected competition, and it would be exempted only in certain circumstances (as described in TD/RBP/CONF.4/8, there are a number of de minimis, functional or sectoral exemptions to prohibitions of RBPs in competition laws, particularly for horizontal practices, but the very existence of such explicit exemptions is an indication of the severity with which horizontal practices are normally treated). 18/ Under the French law, 19/ for example, horizontal practices are presumed to be anti-competitive - although they would be exempted if, for example, they result from the direct application of a legislative text, or occur in an industry subject to special regulation, if a new service could not develop without such restrictions, or if (in a price-fixing arrangement) the enterprises concerned are sharing a common property or resource, or are marketing a collective creation. The Venezuelan law (in terms similar to the Treaty of Rome) has a general prohibition of all conduct, practices, behaviour, contracts or decisions that impede, falsify, restrict or limit competition, followed by a specific prohibition of bilateral conduct involving agreements to fix prices, to limit production, to allocate markets, to force tying or to discriminate between competitors; however, the law allows for the grant of exemptions, as described above. But regulations have been adopted differentiating between the treatment of horizontal and vertical practices, and also distinguishing between per se prohibitions and rule of reason treatment for different practices. 20/ While horizontal arrangements are subjected to stricter controls, certain types of arrangement are exempted; these include inter alia activities relating to standardization, R & D, and specialization. De minimis exemptions are also granted to concerted

activities among competitors when not more than 15 per cent of the market is affected, and when the participating enterprises have a turnover less than a certain sum.

15. In the United States, the Sherman Act simply states that every contract, combination or conspiracy in restraint of trade is illegal; however, the RBPs to which this applies, and the differences between the treatment of horizontal and vertical RBPs, have been clarified through extensive case law over a long period. Per se prohibitions are enforced for horizontal price-fixing, market or customer allocation, collective restraints on output, collective boycotts directly aimed at limiting or excluding competitors and bid-rigging. Rule of reason evaluations are applied for other horizontal practices or arrangements, such as boycotts undertaken with other objectives, or joint ventures. The rule of reason analysis applied to joint ventures would look at whether the scope of the consumer's choices is restricted or widened as a result of the venture. If both parties to a venture would have entered the market alone even in the absence of a joint venture, it would be considered anti-competitive; if neither party would have otherwise entered into the market, the venture would be considered to be pro-competitive, and ancillary restraints necessary to implement the venture would also be legal. However, ventures that are merely devices to facilitate horizontal RBPs, or which have "spillover" effects on markets other than the one in which the venture is operating, would be forbidden. As with mergers, the attainment of greater efficiency is not a cognizable defence to a joint venture having anti-competitive effects; however, efficiency gains will be weighed against anti-competitive effects by the federal enforcement agencies when deciding whether or not to oppose a venture, although efficiency claims will be rejected if less restrictive alternatives exist. It is specifically provided by statute that R & D and production joint ventures are to be examined under a rule of reason standard, subject to certain conditions.

16. The provisions relating to horizontal arrangements under the European Union rules are substantially different from those in the United States competition laws. But the difference is less in enforcement practice: under both sets of laws, for example, joint ventures tend to be challenged less frequently than mergers, given their limited scope and duration. A unique distinction is made under European Union rules between cooperative and concentrative joint ventures: 21/ the former can be exempted if they fall within the exemption clause in Article 85, taking into account the effects of the venture on competition between the parties and on third parties. If a venture is permitted, ancillary restraints reasonably necessary for its formation and operation would also be allowed. A number of block exemptions are provided for different types of horizontal arrangements. Compared to United States law, the treatment of horizontal restraints and joint ventures under European Union law appears to be conducted on a more discretionary and flexible basis, with greater willingness to take into account efficiency and industrial policy considerations.

17. Competition laws in developing countries also generally take a case-by-case approach to the treatment of horizontal practices as long as they are not hard-core cartels. Under the Republic of Korea's competition legislation, 22/ no general criterion is provided to characterize horizontal RBPs. Instead, the law provides an exhaustive list of

collaborative activities between entrepreneurs that substantially restrict competition in any particular field of trade; these include collusive agreements on prices or other sales conditions, on production capacity or output, on customers or markets, on specialization and on joint operating agencies. These practices are prohibited in principle, but the parties may apply to the Commission for prior approval, and exemptions may be granted if certain conditions are met. By 1993, 95 undue collaborative activities had been remedied, about half of them involving price-fixing. 23/

Chapter III

VERTICAL RESTRAINTS

18. Among the different types of vertical restraints, only resale price maintenance is subject to per se prohibitions in most competition laws although, even in respect of this practice, there are often some sectoral exemptions or possibilities for authorization in some countries. In the Republic of Korea, for instance, resale price maintenance is generally prohibited, but is allowed in the case of commodities whose qualities can easily be recognized as being identical, which are for daily use by customers, and in respect of which free competition prevails. Recommendations as to prices are allowed in several countries; in Jamaica, for instance, both individual and collective resale price maintenance (by more than one firm, including through an association) are unlawful, but price recommendations by an individual firm are allowed, although it is unlawful for the indicated price to be enforced through boycotts or discrimination. In India, there is a per se prohibition of resale price maintenance, and even contractual terms requiring consultations on resale prices are invalid where the manufacturer is in a significant position of superiority vis-à-vis the dealer, since consultations could then amount to a directive. 24/

19. Most other vertical practices would usually be evaluated on a case-by-case basis, taking into account inter alia the existence (or the existence and abuse) of dominant positions, market structure and conditions, and entry barriers. However, competition enforcement policies differ significantly as to where the line should be drawn among harmful, neutral and beneficial vertical practices. Such differences reflect the diversity of market conditions from one country to another; countries with low barriers to market entry, such as the United States, are relatively less concerned about vertical restraints than countries with higher barriers. However, variations in enforcement policy are also due to different views regarding the diverging economic theories propounded in this area, as well as to the relative importance attached by competition systems to freedom of economic action and fairness, on the one hand, and economic efficiency, on the other. Enforcement policies in this area may also evolve over time. In the United States, for example, a relatively strict policy was applied towards vertical restraints until the late 1970s. It was then substantially relaxed, and it has now been strengthened somewhat, whilst not returning to the strict policies prevailing earlier. Resale price agreements have always been prohibited per se although, under the "Colgate doctrine", a manufacturer or other supplier acting unilaterally (not through an agreement) may, provided it is not in a dominant position, suggest a resale price to a distributor and discontinue doing business if the suggestion is not followed. Refusals to deal are not considered anti-competitive in themselves, unless they are intended to enforce potentially anti-competitive restraints. Vertical territorial or customer allocations will rarely be prohibited since, even if they may limit interbrand competition, they may facilitate intrabrand competition. 25/ Exclusive dealing or distributorship arrangements would also rarely be considered to be anti-competitive if a market has significant interbrand competition, and if the percentage of the market tied up is relatively small. Tying is illegal per se if the products in question are genuinely distinct, if the supplier has sufficient economic power to appreciably restrain competition, and if a

substantial amount of inter-state commerce is affected by the tied product. A manufacturer that does not have monopoly power over the primary market for its products may be found to have market power in the "derivative market" for after-sales service and spare parts; competition over the provision of servicing is considered to be interbrand in character.

20. In the European Union, the prohibitions contained in Article 85 (1) of the Treaty of Rome apply to vertical as well as horizontal restraints, but are applied with less rigour. A relatively relaxed approach is adopted towards restrictions in distribution agreements (depending on the degree of integration between producer and distributor, and on the object of the contract and the distribution system), and block exemptions have been issued for exclusive distribution, exclusive purchase and exclusive franchise agreements. However, enforcement against discriminatory pricing, exclusive dealing, and refusals to deal is strict where these are imposed by dominant firms. Enforcement against territorial exclusivity arrangements involving restrictions upon parallel imports within the Union is also fairly strict so as to prevent division of the common market. Because of this, enforcement may be relatively stricter than in the United States, although the difference has decreased in recent years.

21. Several competition laws (such as the Venezuelan law) forbid tying restraints although, in some cases, the prohibitions are not absolute. In most competition laws, as under European Union competition law, enforcement against all vertical restraints is stricter where dominance is involved. In Germany, for example, enforcement against tying agreements, refusals to supply and certain discounting practices is strict when these are practised by dominant firms. In Japan, in determining whether exclusive dealing arrangements are anti-competitive, account is taken of whether the supplier or the dealer have dominant market positions, and of whether a substantial part of the distribution channels are foreclosed from new market entry. 26/ An investigation under United States trade legislation is currently proceeding relating to allegations that exports of photographic film to Japan by a United States company are being adversely affected by exclusionary business tactics used by a dominant Japanese company, including exclusive distribution relationships, price-fixing and concealed rebates to distributors (the Japanese company has itself alleged that the United States company is foreclosing competitors from the United States market through exclusivity agreements, tying, bundling and other practices). 27/ Under the Jamaican law, 28/ tied selling is not allowed. However, exclusive dealing and market restrictions may be prohibited only if, because they are engaged in by a major supplier or are widespread in a market, they are likely to have exclusionary effects, such as by impeding entry into or expansion of an enterprise in the market, or the introduction or expansion of sales of goods, so that competition will be lessened substantially; action will not be taken against such restrictions if they will be engaged in for a reasonable time to facilitate market entry, or if they are among interconnected firms.

22. In India, refusals to deal on the grounds of refusal to adhere to resale price maintenance are also usually prohibited, but a refusal to deal is not by itself a restrictive trade practice, unless it is accompanied by some condition in the nature of a tie-up of slow-moving goods, or intended to penalize a dealer for not selling goods below a particular price. 29/ A

rule of reason test is also applied to determine whether other vertical practices are prejudicial to the public interest. In one case involving an exclusive dealing in the cement industry, the Monopolies and Restrictive Trade Practices Commission decided that, having regard to the nature of the commodity involved, which could easily be mixed up with or passed off for another brand of cement, it was reasonable to require that no cement other than that supplied by the manufacturer concerned should be sold or handled. 30/ Out of the 4,500 complaints relating to restrictive trade practices (including both horizontal and vertical practices) pending before the Commission in 1993, about 1,150 were finally disposed of in that year; 44 cases of such practices were dealt with out of the 95 pending cases referred to the Commission; and 75 cases were disposed of out of the 569 cases relating to which the Commission took the initiative to make enquiries. 31/

23. A few countries have special provisions for vertical practices in international contracts. In the Republic of Korea, public notices have been issued describing types of potentially unfair practices in international contracts, although the law has been significantly liberalized in recent years. Parties to a technology or copyright licence, or a distributorship contract (excluding distribution of books, records and films), meeting specified duration and royalty standards may make a voluntary request for review of such agreements; the Fair Trade Commission may order the contract to be modified or cancelled if there would be a substantial negative impact upon competition. Practices that may be proscribed include price, quantity and territorial restrictions, tying, full-line forcing, resale price maintenance, exclusive dealing, and prohibitions on the use of a technology after expiration of the licence.

Chapter IV

ABUSE OF MARKET DOMINANCE AND MONOPOLIZATION

24. The core concept of dominance of a relevant market is similar in most competition laws, although there may be differences in respect of how such dominance is identified. Market share and/or minimum turnover figures may help to trigger off an investigation into a firm's conduct, often establishing a presumption of dominance, but such factors do not suffice to establish dominance under most laws. Under German law, dominance may arise where the enterprise concerned has no competition or no substantial competition, or where it has a paramount market position in relation to its competitors (in practice, this last form of dominance has been the most common). Both monopolies and oligopolies are covered, and enterprises can be considered dominant either as suppliers or as purchasers. There is a presumption of dominance where a firm has one-third market share (the market share threshold is higher for oligopolies), but it is rebuttable, and turnover figures and qualitative criteria are also taken into account in determining whether there is in fact dominance. Under the Slovak law, 32/ a dominant position is held by one or several entrepreneurs if they are not subjected to substantial competition, or if, as a result of their economic strength, they can behave independently from other entrepreneurs and consumers and can restrict competition. The prescribed percentage to establish a rebuttable presumption of dominance is 40 per cent (as under the laws of the Czech Republic, Lithuania or Poland). In Russia, dominance is presumed when there is a market share of 65 per cent or more unless the enterprise concerned proves otherwise; the competition authority may determine, in the light of a number of factors, that an enterprise holding a smaller market share is dominant, but in no case can a firm holding less than 35 per cent be considered dominant. 33/ In India, the threshold for a presumption of dominance is a 25 per cent market share, which is evaluated taking into account interconnections among undertakings. On the other hand, under United Kingdom law, a threshold market share of 25 per cent does not create any presumption of dominance, but serves only to exclude companies without sufficient market power; in the control of dominant positions, distinctions are made between scale monopoly situations, where a company (or interconnected group of companies) has at least 25 per cent market share, and complex monopoly situations, where a group of unconnected companies together possessing 25 per cent all behave in some way that affects competition, even if there is no collusion or oligopoly. 34/ As well as such quantitative criteria, qualitative factors such as the structural advantages of a firm are usually taken into account by competition authorities in determining whether dominance actually exists; conversely, such factors as low entry barriers may rebut presumptions of dominance. But under some laws (such as the Peruvian law), no explicit criteria are provided for determining dominance.

25. A few competition laws have stricter provisions relating to dominance arising from vertical concentration than that arising from horizontal concentrations. Under the Kenyan law, for instance, 35/ market structures are to be kept under review to determine whether there are unwarranted concentrations of economic power whose detrimental impact on the economy outweighs any efficiency advantages of integration in production and distribution. In identifying such concentrations, particular attention is

paid to control of over 30 per cent of distribution or manufacturing units in a market, control of 20 per cent of a manufacturing enterprise together with an interest in a firm distributing its products, or control of 20 per cent of a wholesale distributor together with an interest in a retail distributor supplied by that wholesaler. Such unwarranted concentrations are to be deemed contrary to the public interest if they have the effect of unreasonably increasing costs, prices, profits, of unreasonably reducing or limiting competition, or of deteriorating product quality. A divestment order may be made to remedy the situation.

26. The existence of a dominant position does not in itself constitute a violation of the competition law, although some provisions in several competition laws are directed solely at dominant firms and, in a few cases, competition authorities keep lists of dominant firms. In the Republic of Korea, for instance, market-dominating firms are designated annually by the Fair Trade Commission, including monopolies with market shares over 50 per cent and oligopolies (3 firms) with combined market shares greater than 75 per cent in markets with domestic sales totalling more than 50 billion won (around US$ 60 million). Such firms are prohibited from unreasonably setting prices, restraining output, hindering new entry, eliminating a competitor or otherwise restraining competition. In 1994, 332 firms in 140 markets were designated as market-dominating firms, and orders for correction of abusive practices were issued in one case where a brewing company was hindering new entry in the beer market. 36/ Specific measures are also provided to restrain expansion of the 30 largest conglomerate business groups, such as restrictions upon cross-investments and debt guarantees among affiliated companies; however, qualitative factors such as the number of affiliated companies or distribution of ownership are now also taken into account in designating these firms. A company affiliated to a large business group may not make equity investments in other domestic firms in excess of 25 per cent of its net assets unless this is necessary for enhancing international competitiveness, such as in the case of an investment for technology development or in the core companies of each business group.

27. For enforcement action to be undertaken, dominance must normally be coupled with a specific abuse, involving anti-competitive conduct which could not have occurred if there were effective competition in the relevant market. The concept of abuse is inherently flexible, and no competition law purports to contain an exhaustive list of abusive practices. The difficulty in distinguishing between abuses and the execution of legitimate business strategies designed to gain competitive advantage, as well as the relatively greater concern of some competition laws with considerations of fairness and equity, have led to differences in the solutions adopted in competition laws and in the manner in which they are enforced.

28. However, some common elements to the concept as applied by the competition authorities or courts of different countries may be distinguished, including the growing acceptance of the principle that the main thrust of abuse control should be the protection of the process of competition rather than the viability of individual competitors. Abuse may take the form of exclusionary behaviour aimed at hindering entry or forcing exit of actual or potential competitors through various kinds of monopolistic conduct, such as through predatory pricing, pre-empting of scarce raw materials or distribution

channels or acquisition of key customers or suppliers. It may also involve hindering buyers, suppliers or third parties (the same practice may of course affect both competitors and other parties). It may also involve exploitative behaviour such as excessive pricing or profits (however, excessive pricing is not an abuse under some competition laws such as those of the United States, and other countries rarely enforce their laws' provisions relating to excessive pricing). Or it may involve unjustified discrimination in prices or sales conditions (apart from the general prohibition of abuse, some competition laws, such as the German law, contain special provisions relating to abuse through discrimination). Most vertical practices can constitute abuses in appropriate cases; as indicated above, the existence, or the existence and abuse, of a dominant position are important factors taken into account in deciding whether a particular vertical practice should be proscribed. The Slovak law provides a non-exclusive list of abuses, including enforcement of disproportionate contractual terms, restricting the production, sale or technological development of goods to the detriment of consumers, discrimination constituting a competitive disadvantage, and tying of conditions unrelated to the object of the contract. In some countries, abuse control has been used to prevent natural monopolies from hindering access to "essential facilities" necessary to enable other firms to compete with them in upstream or downstream areas. It is likely that different forms of abuse will be discovered in line with changes in business strategies and in technologies.

29. Under Article 86 of the Treaty of Rome, an abuse by one or more undertakings of a dominant position within the common market or a substantial part thereof is prohibited in so far as it may affect trade between member States. An illustrative list of abuses is provided, including: imposition of unfair purchase or selling prices or other conditions; limiting production, markets or technical development to the prejudice of consumers; discrimination; and tying obligations which, by their nature or according to commercial usage, have no connection with the subject of the contract. It is considered that dominant firms have a special responsibility not to impair genuine undistorted competition, 37/ and abuse may be committed in neighbouring markets which are distinct from those in which dominance is established, if there are "associative links" between such markets. 38/ There are similar legal provisions in countries such as France, Germany, or Poland, where the taking of unfair advantage of economic dependence is also taken into account in determining abuse. Under French law, a distinction is made between the abusive exploitation of a dominant position and abusive exploitation of the economic dependence of a customer or supplier enterprise that has no equivalent choice; examples of such abuse include refusals to sell, tied sales, discrimination, or the breaking-off of established business relations because of the refusal to submit to unjustified commercial terms. Such practices are prohibited where they have the object or effect of affecting competition, unless they promote economic progress and reserve an equitable proportion of the resulting profit to consumers, and do not enable the enterprises concerned to eliminate competition from a substantial part of the product market. Abusive exploitation of economic dependence has been prohibited, for example, where an enterprise has abused its status as the largest customer on a market to have rebates granted to itself and removed

from its competitors. 39/ In some countries such as Japan and the Republic of Korea, special legislation protects small subcontractors from abusive practices by main contractors. 40/

30. The concept of unlawful monopolization under United States law is significantly narrower than the concept of abuse of a dominant position in the laws of some European and other countries. To prove monopolization, it must be shown there is monopoly power in the relevant market. A very high market share (such as a 70 per cent share) would create a presumption of market power; the differences in the techniques used to analyse markets in the United States, compared with the techniques used in some other countries, are particularly important in this connection. But several other factors are taken into account, particularly the ability of a firm to raise prices above (or depress prices below) the competitive level for a significant period of time. It is also necessary to show that there has been a wilful acquisition or maintenance of such power through anti-competitive or predatory conduct, as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident. Conspiracies to monopolize may also be proscribed, as well as attempts to monopolize (if there is a "dangerous probability" that they will be successful).

31. In practice, particularly in recent years, there have been far fewer cases relating to unlawful monopolization in the United States than abuses of dominance cases under the laws of some European countries. It is true that some practices dealt with through abuse control in Europe might be dealt with as distinct practices under United States law, but even in respect of these practices, the requirements for proving injury to competition are more stringent. Predatory pricing is found to exist only if a firm possessing market-power prices its products below cost for a significant period of time in order to drive other competitors out of business. Care is taken to distinguish predation from simple "hard competition", and to ascertain whether new market entry would be prevented by entry barriers. Discrimination as to prices is prohibited under the Robinson-Patman Act if competitive injury may result to unfavoured purchasers or to competitors, but is legal if used by a supplier to meet competition from other suppliers, or if differing costs justify different prices; discriminatorily low prices must be below cost, or there must be clear evidence that the purpose of the lower price was to injure a competitor.

32. Some competition laws proscribe certain practices (which would be caught only under abuse control under some European laws) even where there is no dominant position. The Kenyan law, for instance, forbids price discrimination and predation (subject to a few exceptions) even where there is no dominance. Under the Brazilian law, a business or group of businesses is prohibited from controlling a substantial part of a relevant market, unless this arises from increased economic efficiency in relation to its competitors; dominance is presumed when a company or a group controls 30 per cent of the market. A number of practices are prohibited by the law, including inter alia the unreasonable sale of products below cost, the importation of assets below cost from a country which is not a signatory of the GATT Anti-dumping and Subsidies Code, and the unreasonable imposition or increase of abusive prices, if they

restrain competition, lead to control of the market, the increase of profits on a discretionary basis, or the abuse of market control. Under the Venezuelan law, unilateral conduct restricting competition can take the form of either abuse of dominant position (through price discrimination, unjustified limitations on production or distribution, unjustified refusals to deal and unjustified tying) or other unilateral conduct restricting competition even though there is no dominant position, such as conduct manipulating factors of production, distribution, technical development or investments.

Chapter V

MERGERS, JOINT VENTURES AND INTERLOCKS

33. The treatment of mergers, joint ventures and interlocking directorates and shareholdings is one area in which there are significant differences among different competition laws, and enforcement policies. Most competition laws cover these areas. Some competition laws, such as the Jamaican law, do not apply to mergers or interlocking directorates, but in some of them, mergers would still be covered under provisions relating to abuse of dominant position. However, in recent years, several countries have adopted separate provisions in their competition laws to cover mergers. Joint ventures as a distinct category are covered only implicitly in most laws, through their provisions relating to horizontal practices and/or mergers. It is much more common, as noted above, for specific types of ventures to be granted functional, sectoral or personal exemptions. Differences in the treatment of mergers and joint ventures under competition laws relate, inter alia, to: legal provisions and enforcement policy relating to different types of horizontal, vertical and conglomerate arrangement; the structural and behavioural factors taken into account and their relative importance, including the market share and/or turnover thresholds to trigger off scrutiny by competition authorities, and the anti-competitive criteria to be met before an arrangement would be forbidden in principle; the treatment of efficiency gains and of non-competition criteria; the coverage and structure of exemptions; and procedural arrangements, such as voluntary or compulsory notifications for mergers or joint ventures of firms meeting certain turnover or market share requirements, or ex post facto possibilities for intervening against mergers, and remedies or sanctions. Essentially, two types of policy approach have been adopted towards merger control: one focusing on the creation or strengthening of market dominance and possibilities for abuse which a merger may bring about; and the other on actual or possible behaviour of merging firms which might substantially lessen competition. Canada, for example, has no concentration or market share thresholds for triggering off merger investigations. But the distinction between these two approaches is blurred. However, the application of non-competition criteria such as competitiveness, industrial policy or public interest is particularly prevalent in the control of mergers and joint ventures, and this could give rise to differences in the treatment of individual cases. 41/ But, on the whole, the similarities among most competition regimes relating to the treatment of mergers are more important than the differences.

34. As part of the general trend towards the adoption or reform of competition legislation, several countries have adopted or reformed merger controls following the same broad orientations. It is increasingly common to provide for optional or mandatory pre-notification of mergers over a certain size. An economic analysis is usually undertaken as to whether a merger will enable market power to be exercised over prices or other dimensions of competition, taking into account such factors as market structure, and possibilities for product substitution and new market entry. Vertical and (in particular) conglomerate arrangements are usually considered to raise less competition concerns than horizontal arrangements. In Kenya, for instance, where there is a pre-notification system, only horizontal mergers are controlled, taking into account whether the proposed merger will lead to

greater efficiency and competitiveness against imports and in export trade, thereby increasing employment, whether it will reduce competition in domestic markets and increase the ability of oligopolistic producers to manipulate domestic prices, and whether it is disadvantageous by encouraging capital-intensive rather than labour-intensive production.

35. The criteria applied under the Canadian or Kenyan laws may be contrasted with the greater relative emphasis on competition and consumer welfare considerations in the application of the United States laws. These prohibit mergers whose effect may be to lessen competition substantially, or to tend to create a monopoly. Pre-notification has to be done for mergers over a certain size. The main focus of enforcement is on horizontal mergers. The combined market share of the merging firms and concentration levels (as measured by the Herfindahl-Hirschman Index 42/), are the starting-point in evaluating whether a merger will increase market power or ability to collude. Other factors that will be taken into account include ease of market entry, the presence of powerful buyers, the likelihood of collusion, whether one firm is failing and would leave the market but for the merger, and whether there would be significant efficiency gains from the merger which could not be achieved by other means. As described above, joint ventures (provided they are not a cover for cartels) are subject to a rule of reason analysis similar to that given to mergers, albeit with some specific features. Interlocking directorates are prohibited if the firms concerned are competitors and exceed a certain size. There has been very little enforcement against interlocking shareholdings, but it has been held that a minority holding by one company in another company was unlawful since it provided an unfair competitive advantage in the sale of products to the other company. 43/

36. Under German law, there is a greater focus on the question of dominance. Mergers may be prohibited if they are likely to create or strengthen a market-dominating position, unless the participating enterprises prove that the merger will also lead to improvements in the conditions of competition that outweigh the disadvantages of market domination. The acquisition of a direct or indirect controlling influence over another firm is considered to be a merger for this purpose, as are certain joint ventures and interlocking directorates (which are prohibited where at least half of the members of the managing or supervisory bodies of two firms are the same). There is a de minimis exemption for arrangements involving firms having less than a certain turnover. A pre-notification system is in place for large mergers. Even after a merger has been prohibited by the Federal Cartel Office, the Federal Minister for Economic Affairs may authorize it if its restraint upon competition is outweighed by advantages to the whole economy, or if it is justified by a predominating public interest, provided that the market economy system is not jeopardized. Joint ventures would be analysed under the competition law's provisions relating to both cartels and mergers.

37. Many developing countries have recently adopted merger controls, in the context of adoption or reform of competition laws. However, in general, enforcement policy against mergers and joint ventures in most developing countries has so far tended to be relatively relaxed as compared with controls on behavioural practices, and as compared with the emphasis given to merger controls in many developed countries. This is often because of concerns about adversely affecting scale economies and competitiveness, as well as the

difficulties of assessing probable harm to competition in a rapidly changing and liberalizing developing country environment. In Venezuela, for instance, where the competition law prohibits economic concentrations restricting free competition or resulting in a situation of dominance, the competition authority has chosen not to intervene against mergers in most cases because of such reasons, while making clear to the merging firms that there would be strict enforcement against anti-competitive conduct. 44/ Similarly, the Indian competition law, which had strict pre-notification controls upon mergers, as well as upon any substantial expansion of the activities of an undertaking which had assets of a certain worth, or a dominant undertaking, was liberalized in 1991, with the aim of focusing more upon behavioural practices. However, the Government continues to retain the ex post facto power to direct division of an undertaking and the severance of inter-connection between undertakings (linked by common or interlocking ownership, control or management), if the working of the undertaking is prejudicial to the public interest or is likely to lead to the adoption of any monopolistic or restrictive trade practices. The competition authority advises the Government as to appropriate measures, and several mergers are currently being investigated. 45/ In the Republic of Korea, firms with equity capital or assets exceeding given amounts are prohibited from undertaking "business integrations" if they may cause substantial injury to competition in any line of commerce, 46/ although these are allowed if the Fair Trade Commission deems it necessary in order to rationalize or to strengthen the international competitiveness of an industry. While the Commission has been active in controlling "business integrations" in general, 47/ only two mergers have been actually prohibited so far; 48/ however, warnings have been issued in a substantial number of cases in respect of delayed reports of mergers or as early warnings against possible violations of the law. It is likely that changes in market structure in developing countries will create pressures to implement a more active merger control policy. Controls against interlocking directorates have been slack in most developing countries because of the nature of business cultures, but this is also likely to change.

Notes

1/ Paragraph I.1. of the Agreed Conclusions states that, in order to assist the Third Review Conference in its work, the Group of Experts requests the UNCTAD secretariat to prepare a draft study on the scope, coverage and enforcement of competition laws and policies in member States and analysis of the provisions of the Uruguay Round Agreements relevant to competition policy, including their implications for developing and other countries, in accordance with the outline as contained in TD/B/RBP/105, and taking into account the comments made during that session of the Group of Experts. See the "Report of the Intergovernmental Group of Experts on its fourteenth session (TD/B/42(1)/3-TD/B/RBP/106).

2/ See Chapter I of the note entitled "Preparations for the Third United Nations Conference to Review all Aspects of the Set of Principles and Rules for the Control of Restrictive Business Practices" (TD/B/RBP/105).

3/ See also "Draft commentaries to possible elements for articles of a model law or laws" (TD/B/RBP/81/Rev.4).

4/ See Article 1, Law to Promote and Protect the Exercise of Free Competition of 30 December 1991.

5/ See the Statement of Objects and Reasons of the Monopolies and Restrictive Trade Practices Act 1969.

6/ See Northern Pacific Railway v. United States, 356 U.S. 1 (1958).

7/ See section 15 of the Fair Trading Commission Act, No. 1 of 1987. This is a non-exhaustive list.

8/ This can include allocative efficiency within an economy, enterprises' productive efficiency, or their dynamic efficiency (ability to innovate).

9/ See Article 2 of the Treaty of Rome 1957.

10/ Competition Act of 1986, section 1.1.

11/ See the Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 2 April 1992 (the 1992 Guidelines).

12/ See "The role of competition policy in economic reform in developing and other countries" (TD/RBP/CONF.4/2).

13/ The term "undue" may also be employed in competition systems applying rule of reason approaches, where it is understood to mean "unreasonable".

14/ Potential imports would be taken into account in the United States but not in Germany.

15/ See François Souty, "Entre 'concurrence praticable' et contestabilité: les barrières à l'accès au marché dans les théories américaines de la politique de la concurrence", Revue de la concurrence et de la consommation, No. 80, Juillet-Aout 1994. Under the theory of contestability, a market which appears to be dominated by a monopoly may still be efficiently structured, because of the potential risk that there will be new market entry if the monopoly tries to abuse its position.

16/ See the Antitrust Guidelines for the Licensing of Intellectual Property, Department of Justice and Federal Trade Commission, 6 April 1995. A technology market consists of intellectual property that is licensed and its close substitutes. An innovation market consists of R & D directed to particular new or improved goods and processes, and close substitutes in terms of R & D efforts, technologies and goods.

17/ Some laws use general criteria (often combined with illustrative lists of practices) to designate RBPs, while others provide an exhaustive list of RBPs.

18/ As noted in that study, exemptions may not necessarily constitute a non-application or weakening of competition principles for industrial policy reasons, but may follow from the normal application of principles of competition and efficiency to the specific features of certain types of transactions. And rule of reason evaluation of a practice may have the same effect as an explicit exemption.

19/ L'ordonnance No. 86-1243 du 1er décembre 1986 relative à la liberté des prix et de la concurrence.

20/ See Ana Julia Jatar, "Implementing competition policy on recently liberalized economies: the case of Venezuela" (mimeo).

21/ Concentrative ventures are autonomous entities which result in lasting structural changes in the market, and may thus be analysed (if they meet certain turnover or market share thresholds) under the Merger Control Regulation, No. 4064/89, O.J. L 257/13 (1990), under which it will be assessed whether they will create or enhance a dominant position in the Common Market. Cooperative ventures represent a temporary coordination of competitive behaviour among otherwise independent firms (or between them and the venture) and are analysed under a Commission Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the Treaty, O.J.C. 43/2 (1993).

22/ Monopoly Regulation and Fair Trade Law 1980, Law No. 3320 of 31 December 1980, and the Enforcement Decree of the Law, No. 10267 of 1 April 1981.

23/ See "Competition and trade in the post-Uruguay Round" (UNCTAD/ITD/11), consultant report prepared for the UNCTAD secretariat by Mr. Kyu Uck Lee.

24/ See RTP Enquiry No. 65 of 1984 in the matter of M/s. Mohan Meakins Ltd., decided on 11 April 1986.

25/ Interbrand competition occurs among manufacturers of the same generic product, while intrabrand competition occurs between distributors of the product of a particular manufacturer.

26/ See the Anti-monopoly Act of Japan and the Fuji Photo Film Corp. case, decision of 11 May 1985, 28 FTC 10.

27/ See "Washington to probe Japan photo film market", Financial Times, 4 July 1995, and "Kodak and Fuji trade anti-competitive allegations", Financial Times, 1 August 1995.

28/ The Fair Competition Act 1993.

29/ See RTP Enquiry No. 93 of 1985 in the matter of Hemraj Electronics vs. Monika Electronics Private Ltd., Commission order of 9.1.1986.

30/ See Director General (I & R) vs. India Cements Ltd., RTP Enquiry No. 48 of 1985, decided on 8 April 1986.

31/ See S. Chakravarthe, "Country paper - India - some perspectives - Fifth conference on competition policies among Asian and Oceanic countries", in Fair Trade Commission, The Fifth Meeting of the Conference on Competition policies among Asian and Oceanic countries", June 1995.

32/ Act No. 188 "Protection of Economic Competition" of 8 July 1994.

33/ See the Law of 22 March 1991 "On Competition and the Limitation of Monopolistic Activity on Goods Markets".

34/ Under the United Kingdom's Fair Trading Act 1973. In addition, the Competition Act 1980's provisions relating to anti-competitive practices apply to a company or group of interconnected companies only if it has a given turnover and has a minimum of 25 per cent market share.

35/ The Restrictive Trade Practices, Monopolies and Price Control Act 1988.

36/ See Lee, Jong Kha, "Recent trends in competition policy and law - country report for 5th Asia-Oceania Competition Policy Conference, 9-10 November 1994", in Fair Trade Commission, op. cit.

37/ See the cases of Michelin (1983) ECR 346, and Hoffmann La Roche (1979) ECR 461.

38/ See Tetrapak v. Commission, Decision 92/163/EEC of 24 July 1991, O.C.J. L 72, 18 March 1992, p.1.

39/ See Décision no. 93-D-59 du Conseil de la concurrence en date du 15 décembre 1993 relative à des pratiques relevées dans le secteur de la publicité.

40/ The Act on Fair Subcontract Trade of 31 December 1984.

41/ See "Concentration of market power through mergers, takeovers, joint ventures and other acquisitions of control, and its effects on international markets, in particular the markets of developing countries" (TD/B/RBP/80/Rev.2).

42/ A measure of industry concentration based upon the sum of the squares of the market shares of the industry participants.

43/ See United States v. E.I. DuPont de Nemours & Co., 353 U.S. 586 (1957).

44/ See Jatar, op. cit.

45/ See Chakravarthe, op. cit.

46/ The term "business integrations" refers to mergers, takeovers, interlocking directorates and participating in the establishment of new firms.

47/ See "Concentration of market power", op. cit.

48/ See Lee, Jong Kha, op. cit.

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